NO. 464

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY, PETITIONER,

VS.

WALTER O. HILL, TREASURER AND EX-OFFICIO COLLECTOR IN AND FOR HENRY COUNTY, MISSOURI, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

ROY W. RUCKER,
JOHN MONTGOMERY, JR.,
LEE MONTGOMERY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Brinkerhoff-Faris Trust & Savings Company, a corporation, presents this, its petition and prays that a writ of certiorari may be granted directing the Supreme Court of the State of Missouri to certify to this Honorable Court, for its review and determination, the case of *Brinkerhoff-Faris Trust & Savings Company, Appellant,* v. *Walter O. Hill, Treasurer and Ex-officio Collector of the Revenue within and for Henry County Missouri, Respondent,* being

cause No. 29,549 of said Supreme Court of Missouri, and for reasons for this application shows this court that on the 26th day of April, 1928, your petitioner instituted this action in the Circuit Court of Henry County, Missouri, against Walter O. Hill, Treasurer and *ex-officio* Collector of Revenue of Henry County, Missouri, wherein the petitioner sought to enjoin the collection of 25 per cent of the taxes assessed and levied against the shares of stock in the petitioner corporation for the year 1927 upon the ground that the taxing authorities of Clinton township and Henry County, Missouri, deliberately, intentionally, systematically, and arbitrarily assessed the plaintiff's property, as represented by its shares of stock as of June 1, 1926, at 100 per cent of its true value in money and undervalued and assessed all other property which was subject to an *ad valorem* tax in said township at not to exceed 75 per cent of its true value in money, and deliberately, intentionally, systematically, and arbitrarily failed and omitted to assess certain classes of property in Clinton township of great value, to-wit, poultry of all kinds and sucking animals of all kinds, and that such action of the taxing authorities was a discrimination against and a fraud upon the plaintiff and its shareholders and placed an unjust and unequal burden of taxation upon them and was a denial to them of their constitutional right to have their property taxed uniformly with other property in the same class for purposes of taxation, and was a denial of plaintiff's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States,

which provides that no state shall deprive any person of life, liberty or property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws. The petition also stated that the plaintiff had tendered to the defendant 75 per cent of the taxes assessed and levied against its stock, which the collector refused to receive and that the plaintiff now tenders to defendant and continues to tender to the defendant and that the plaintiff had no complete and adequate remedy at law; that its right of appeal from the assessor to the County Board of Equalization could not have afforded it any relief whatever for the reason that the County Board of Equalization was wholly without power to fix the amount of the assessment because the amount of the assessment had already been finally fixed and adjudged by the State Board of Equalization on April 1, 1927, before the County Board of Equalization could lawfully meet for the purpose of equalizing the taxes of the year 1927; that the plaintiff had no right to appeal from the assessment judgment as finally entered by the State Board of Equalization to any other court or tribunal and that the plaintiff's right to a writ of certiorari against the State Board of Equalization, whereby it might have the bare record of the State Board of Equalization sent to a court for review did not afford this plaintiff any remedy whatsoever because the discrimination of which it now complains does not appear and could not be made to appear upon the record of the State Board of Equalization.

The petition further alleged that the defendant had on April 5, 1928, instituted a suit in the Circuit Court of Henry County, Missouri, against this plaintiff as defendant for the recovery of the taxes so assessed and levied as aforesaid against its shares of stock for the year 1927, and that the plaintiff's right to have 25 per cent of the said taxes declared null and void on the ground of the deliberate, systematic, intentional, and arbitrary discrimination aforesaid is not available to the plaintiff as a partial defense to said action or by cross bill therein and that the plaintiff can only avail itself of its said right in an independent action brought for the purpose of attacking the said assessment; that unless plaintiff is granted the relief sought in the petition it will be compelled to pay the said illegal tax and that after the said taxes shall have been paid by the plaintiff, its shareholders are wholly without any remedy at law or in equity.

The plaintiff further alleged and it was admitted that Henry County, Missouri, was under township organization.

The plaintiff prays that the court will restrain and enjoin the defendant from prosecuting the said action at law for the recovery of the taxes until the court shall finally determine this present action and for that purpose will issue its temporary restraining order and, if this present action shall end in a judgment for plaintiff, that the court will forever restrain and enjoin the defendant from collecting or attempting to collect any part of said taxes in excess of seventy-five percentum thereof, and for such other and further

relief as the plaintiff might be equitably entitled to receive.

The answer (Abstract of the Record, page 16) after denying the allegations of the petition, alleges that the plaintiff is guilty of laches in not availing itself of the right given to it by law under Articles 3 and 5 of Chapter 110 of the Revised Statutes of Missouri of 1919 (which relate to the County Board of Equalization and the State Board of Equalization), and alleges that the plaintiff is estopped from maintaining its action because of its failure to appear before the County Board of Equalization or the State Board of Equalization and is estopped because the judgment of the State Board of Equalization fixing the values complained of is a final judgment.

The plaintiff's reply was a general denial.

Your petitioner further shows that at the trial of the above entitled cause in the Circuit Court of Henry County, Missouri, the plaintiff showed that the total assessed value of the stock of all of the banks and trust companies of the county as of June 1, 1926, as found by the assessor, was $681,140.00 (p. 40) and that the assessment of plaintiff's shares of stock was $144,660.00 and that all of said assessments were made at 100 percentum of the actual value in money. This evidence was not disputed.

Plaintiff's evidence showed and it was not denied that all the township assessors, including the assessor of Clinton township, intentionally, systematically, deliberately, and arbitrarily omitted to assess any poultry of any kind (pp. 161, 199, 227, 233, 241) and that the

value of chickens (p. 60) in Henry County was between $400,000.00 and $500,000.00 on June 1, 1926 (pp. 178, 181, 183); and also that it was the deliberate policy not to assess any sucking animals (pp. 240, 198, 227, 64, 161) and that sucking lambs on June 1, 1926, were worth more than all other sheep in Henry County (pp. 164 and 165). This was undisputed. Plaintiff showed by competent and well qualified experts, who studied every transfer of real estate in Henry County made in the calendar year of 1926, that the assessed valuations of properties conveyed during that year were not over 60 per cent of the actual considerations for the transfers (pp. 83 and 84) and that real estate in Clinton township was assessed at not to exceed 75 per cent of its true value in money (p. 83). This evidence was uncontradicted. The defendant admitted under oath that merchants' stocks of merchandise in Clinton township in which is located the biggest city in Henry County, were assessed as of June 1, 1926, at about 75 per cent of their true value (p. 50). The plaintiff's evidence showed that sheep in Henry County were assessed at an average value of $4.59 per head, but were worth on an average more than twice that much; that neat cattle were assessed at $29.77 per head, but were worth more than twice that much (pp. 58 and 59); that hogs were assessed at $13.91 a head which was about two-thirds their value (p. 59); that horses were assessed at an average of $31.66 a head, which was not 60 per cent of their value (p. 67) and that mules were assessed at $47.69 a head, which was not half their value (p. 64). This evidence was uncontradicted.

Plaintiff's evidence showed that household goods were assessed at from 10 per cent to 50 per cent of their actual value.

The defendant's testimony consisted wholly of the testimony of the judges of the county court, all of whom were farmers, the assessor of Clinton township, the county surveyor, who is a member of the County Board of Equalization, and several assessors of other townships. The members of the County Board of Equalization testified that they told the assessors to assess everything at full value and that they also tried to equalize all property at 100 per cent, but that the assessors did not assess any sucking animals of any sort and did not assess any poultry.

The assessor of Clinton township, who made the assessment in question, testified that he assessed property at as near 100 per cent as he knew how (p. 238); that his method of assessment was to follow a schedule "already drawed" (p. 238) by which they tried to make an average to follow for different kinds of stock. He didn't go to see any property (p. 239), but left the assessment list with the taxpayer for him to fill out, sign and return to him. He didn't put the taxpayer under oath (p. 239). He told the taxpayers that they didn't have to list sucking animals (p. 240). He didn't assess any chickens (p. 241). He and eighteen other township assessors met with the county court some time before June 1 and agreed that $5.00 would be a fair rate on sheep (p. 241) and that $30.00 would be a flat rate on grade cattle three years and over (pp. 244 and 247).

The proof of the fact of the discrimination was overwhelming and the evidence was uncontradicted that certain entire classes of property were intentionally omitted from assessment and that the assessment of all kinds of livestock was made according to a schedule of flat rates or average rates which was made weeks before June 1 and that the average rates were about one-half as high as they should have been.

A comparison of the total assessed values of the several classes of livestock and farm machinery in Henry County on June 1, 1926 (p. 41) with the values of livestock and farm machinery in Henry County on June 1, 1925, as shown by the Federal Census of Agriculture (p. 178) practically tells the story.

	Total assessed value in Henry County June 1, 1926 (p. 41).	Total value in Henry County according to Federal Census of Jan. 1, 1925.
Horses	$248,455.00	$464,078.00
Mules	170,655.00	280,856.00
Cattle	721,018.00	1,042,057.00
Sheep	21,321.00	56,426.00
Swine	244,468.00	541,323.00
Chickens	Nothing	426,482.00
Other livestock	850.00	20,582.00
Farm implements	168,404.00	901,272.00

The court below found for the defendant. Petitioner filed motion for new trial in due time and the same was overruled and petitioner appealed to the Supreme Court of Missouri. The motion for new trial raised the questions under the Federal Constitution

which are here involved. The Supreme Court of Missouri on June 29, 1929, rendered a judgment affirming the judgment of the court below. Within the time provided by law and the rules of the Supreme Court, petitioner filed a motion for rehearing, which motion raised the questions herein raised and was overruled on August 2, 1929, at which time the judgment of the Supreme Court of Missouri became a final judgment. This petition is now filed within three months after said judgment became final.

Your petitioner further shows that the said Supreme Court of Missouri is the court of final appellate jurisdiction in the State of Missouri in causes of this character.

Your petitioner further shows that a Federal question is involved.

Your petitioner further shows that in this cause your petitioner set up and claimed a right, privilege or immunity under the Constitution of the United States and particularly under Section 1 of the Fourteenth Amendment of the same which forbids any state to deny to any person the equal protection of the laws and to take any person's property without due process of law and that the decision of the Supreme Court of Missouri contravenes petitioner's rights in these respects, as follows:

(1) The effect of the decision is to hold that your petitioner has no remedy except to have the property which is assessed below its true value (consisting of the great mass of all property within the taxing district), raised rather than to have the assess-

ment of petitioner's own property, which is assessed at its true value, reduced to the average level of other property.

Sioux City Bridge Co. v. *Dakota Co.*, 260 U. S. 441, l. c. 446.

This point is further elaborated in the supporting brief.

(2) The decision of the court in this cause rendered August 2, 1929, holding that the petitioner had a full, adequate, and complete legal remedy in 1927 by appealing to the State Tax Commission, thereby overruling a decision which it handed down in 1922 and which continued to be the law of Missouri until the decision in the present case, denies to plaintiff due process of law because it comes too late to enable your petitioner to appeal to the State Tax Commission for redress against the discriminatory tax and leaves your petitioner without any remedy whatever in the courts for this infringement of its constitutional rights. If your petitioner had no right to appeal to the State Tax Commission before it had instituted the present action, then there was no tribunal provided by the law of the State of Missouri to which it could go for protection against an intentionally discriminatory assessment which deprived it of the equal protection of the laws.

This point is further elaborated in our supporting brief.

Your petitioner files herewith a transcript of the record in the case including the proceedings had in the Supreme Court of Missouri and ten copies of the record as printed below.

Wherefore, in view of the premises, your petitioner prays that this Honorable Court will grant its writ of certiorari directed to the Supreme Court of the State of Missouri requiring that the complete record in said cause in said court and its judgment thereon, together with the motion for rehearing and the ruling of said court thereon, be certified to this court and that this Honorable Court will thereupon proceed to correct the errors complained of and reverse the judgment of the said Supreme Court of the State of Missouri and give to your petitioner such other and further relief as the nature of the case may require and as may seem proper to the court in the premises.

Brinkerhoff-Faris Trust and Savings Co.,
Petitioner.

By Roy W. Rucker,
John Montgomery, Jr.,
Lee Montgomery,
Its Attorneys.

State of Missouri, County of Pettis, ss.

Roy W. Rucker, being duly sworn, upon his oath deposes and says that he is one of the counsel for petitioner, Brinkerhoff-Faris Trust & Savings Company, a corporation; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied the transcript of record and proceedings in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record and proceedings and that he knows of the

above proceedings had and that he verily believes the facts stated in said petition are true.

Ray Lauder

Subscribed and sworn to before me this 17th day of October, 1929.

My commission expires Nov. 21, 1931.

(Seal) Ona Mae Palmer

Notary Public within and for
Pettis County, Missouri.

In the Supreme Court of the United States, October Term, 1929. Brinkerhoff-Faris Trust & Savings Company, Petitioner, vs. Walter O. Hill, Treasurer and ex-officio Collector in and for Henry County, Missouri, Respondent.

ASSIGNMENT OF ERRORS.

I.

The decision of the Supreme Court of Missouri in this cause contravenes the appellant's right under Section 1 of the Fourteenth Amendment of the Constitution of the United States to the equal protection of the laws by refusing to grant petitioner any relief against an assessment which was intentionally, deliberately, systematically, and fraudulently discriminatory against the petitioner.

II.

The Supreme Court of Missouri erred in refusing to grant such relief to the petitioner against such discriminatory assessment for taxes by holding that the petitioner had no right to come into a court of equity for injunctive relief against the discriminatory part of the assessment and tax because the petitioner had not first appealed to the State Tax Commission for redress of its grievances when, under the law at the time when said appeal must have been taken, Article IV of Chapter 119 of the Revised Statutes of Missouri of 1919, which purported to grant a legal remedy to petitioner against such discriminatory assessment and tax, was held to be unconstitutional in so far as it was

intended to give the State Tax Commission any power or jurisdiction to grant redress against such discriminatory tax. The effect of such decision was to deprive the petitioner of an opportunity to be heard in defense of its constitutional rights before any tribunal or administrative body and amounts to a denial to the petitioner of due process of law guaranteed to it under the Fourteenth Amendment of the Constitution of the United States.

III.

The Supreme Court of Missouri erred in refusing to grant relief to the petitioner against such discriminatory assessment of taxes on the ground that the petitioner must first exhaust his legal remedy, that is, by appealing to the State Tax Commission, although the State Tax Commission has no legal right or authority to lower the assessment of petitioner's property which is admittedly assessed at its full value in money. Therefore, the State Tax Commission could only grant relief by placing upon the assessment rolls all of the property deliberately omitted therefrom and by assessing such omitted property and the great bulk of other property which was under-assessed, at their full value in money. This is equivalent to a holding that the petitioner's remedy is not in a court of equity, but by a proceeding before a tribunal for the purpose of getting the assessment of other property raised up to the level of the assessment of petitioner's property.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The only possible relief which the State Tax Commission could have granted to the petitioner, if the petitioner had applied to it for redress, would have been for the State Tax Commission to have placed upon the assessment rolls the property which had been intentionally omitted therefrom by the other assessing officers and by assessing the same and also all underassessed property, which embraced practically all other property in the taxing district, at its full value in money.

The powers of the State Tax Commission are conferred by Article IV of Chapter 119 R. S. Mo. 1919 which, among others, contains the following provisions:

Section 12,847. It shall be the duty of the Commission and the Commission shall have power and authority, subject to the right of the State Board of Equalization, finally to adjust and equalize the value of real and personal property among the several counties of the state, as follows:

(1) To have and exercise general supervision over all the assessing officers of the state, over county boards of equalization and appeal in the performance of their duties and to take such measures as will secure the enforcement of the provisions of this article and all the properties in this state liable to assessment

for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law.

(3) To receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist.

(7) To cause to be placed upon the assessment rolls omitted property which may be discovered to have, for any reason, escaped assessment and taxation * * *.

(8) To raise or lower the assessed valuation of any real or personal property of any individual * * * or corporation; provided, etc.

All of the statutes of Missouri relating to the assessment of real and personal property of every character provide that all property shall be valued and assessed according to its true value in money.

Sections 12802 and 12775.

The State Board of Equalization, whose approval is necessary to give validity to any Act of the State Tax Commission is only given authority to assess property at its true value in money.

Section 12855 confers upon the State Board power only to increase the valuation of property which it believes to be valued below its real value in money by such percentum as will increase the same to its true value or to deduct from the valuation of property

deemed to be valued below its real value in money such percentum as will increase the same in each case to its true value.

There is nothing in the entire statutory scheme for the assessment of property in Missouri which authorizes any assessing officer or body to assess any property at less than its true value in money.

The State Tax Commission had no legal right or power to assess our stock at less than its admitted true value in money. Therefore, it could only grant redress by raising everything else up to the level of our assessment.

As regards discriminatory valuations, the possibility of relief in administrative tribunals is at best doubtful. Therefore, where it is doubtful whether the Tax Commission has authority to equalize valuations downward and so avoid the pernicious effect of alleged discrimination, the decision of the Supreme Court of Missouri holding that recourse must first be had to the State Tax Commission is equivalent to holding that the petitioner has no remedy except to have the property assessed below its true value raised, rather than to have its property which is assessed at its true value reduced. Such remedy is no remedy at all and the decision of the Supreme Court requiring petitioner to have recourse to such a remedy is a denial to the petitioner of the equal protection of the laws.

Sioux City Bridge Co. v. *Dakota Co.*, 260 U. S. 441, l. c. 445 and 446.
Green v. *R. R. Co.*, 244 U. S. 499, l. c. 520.
Conn v. *Ringer*, 32 Fed. (2d) 639, l. c. 644.

II.

From the time of the assessment of petitioner's property in June, 1926, until the final judgment of the Supreme Court of Missouri in this cause, August 2, 1929, there was no court, tribunal, or administrative body in existence which had authority to hear the petitioner's complaint or grant any redress whatever excepting a court of equity.

(1) The County Board of Equalization had no power to grant relief to petitioner. The Supreme Court of Missouri so held in the opinion in this cause.

(2) There was no statute providing for an appeal to the State Board of Equalization. See the opinion in this cause.

(3) The aggrieved taxpayer cannot pay the tax under protest and later recover the same.

Robbins v. *Latham,* 134 Mo. 466.

(4) The aggrieved taxpayer cannot set up the defense of fraudulent discrimination as a defense in an action by the Collector to collect the tax, but must resort to a court of equity.

State ex rel. v. *Western Union Telegraph Co.,* 165 Mo. 502.

State ex rel. v. *Johnson,* 279 Mo. 228.

(5) The aggrieved taxpayer had no right of appeal to the State Tax Commission and the State Tax Commission had no jurisdiction to entertain any such appeal or to grant any redress because the law under which the State Tax Commission came into existence

and derived its powers was unconstitutional in so far as it appeared to confer any such jurisdiction.

Laclede Land & Imp. Co. v. *State Tax Commission,* 295 Mo. 298.

This case was overruled by the Supreme Court in the present case.

There was, therefore, no place in the whole scheme of assessing or levying or collecting the tax for the petitioner to be heard excepting in a court of equity.

Boonville Nat'l Bank v. *Schlotzhauer,* 317 Mo. 1298.

Therefore, the decision of the Supreme Court of Missouri that the petitioner had no standing in a court of equity because it had failed to pursue its legal remedy, left the petitioner without any court or tribunal competent to pass on the validity of a fraudulently discriminatory tax and is a denial to the petitioner of due process of law.

Central of Georgia Ry. Co. v. *Wright,* 207 U. S. 127, 141.
Londoner v. *City,* 210 U. S. 373, 385.
Turner v. *Wade,* 254 U. S. 64. 67.

The assessment was made by the assessor as of June 1, 1926.

R. S. Mo. 1919, Sec. 12766.

The State Board of Equalization met for the purpose of equalizing the taxes of 1927, in February, 1927. Sec. 12854.

The County Board of Equalization met for the same purpose on the first Monday of April, 1927. Sec. 12820.

The taxes of 1927 fell due October 1, 1927, and became delinquent January 1, 1928. Sections 12,906 and 12,907.

If the petitioner had a right to appeal to the State Tax Commission said appeal must be taken between April 1, 1927 (Abs. of Record, p. 42) and the time when the Collector receives the tax books from the County Collector. Sec. 12848.

Respectfully submitted,

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